Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO 25–30–03 OF 2014
COLLIN SEQUERAH JC
9 DECEMBER 2015

Family Law — Children — Adoption — Whether making of adoption order entitled adopted child to be registered as Malaysian citizen as of right and/or by operation of law — Whether neither Federal Constitution nor Adoption Act 1952 made any stipulation as to effect adoption order was to have on citizenship of adopted child — Whether adopted child whose biological and lawful parents were unknown could not qualify for Malaysian citizenship by operation of law pursuant to art 14(1)(b) read with s 1(a) of Second Schedule of the Federal Constitution — Whether adoptive parent should have applied for citizenship of child by way of registration pursuant to art 15A of the Federal Constitution first before seeking relief from court — Specific Relief Act 1950 s 44

The question before the High Court in the instant matter was whether an adoption order entitled an adopted child to be registered as a Malaysian citizen as of right and/or by operation of law pursuant to art 14(1)(b) of the Federal Constitution. The applicant herein had obtained an adoption order from the sessions court to adopt a female child who was born in Malaysia but was abandoned by her biological parents. The child's birth certificate noted that information about her biological parents could not be obtained. The respondent, on being ordered by the court to register the adoption order, issued a new birth certificate for the child that classified her as 'non-citizen' even though the applicant was registered and named as her mother. The respondent rejected the applicant's application to register the child as a Malaysian citizen and advised her to make a formal application for such citizenship. In filing the instant application to review the respondent's said decision, the applicant relied upon the adoption order and ss 9 and 25A of the Adoption Act 1952 to contend that as she was a Malaysian citizen, the child ought also to be registered as one as the effect of the adoption order was to deem the child as having been born to her in lawful wedlock. The applicant argued that if the respondent did not register the child as a Malaysian citizen the child would be rendered stateless and that fact might adversely affect the child psychologically. The applicant further contended that as the child was born in Malaysia she was a citizen of the country by operation of law under art 14(1)(b) read with Part II of the Second Schedule of the Federal Constitution. The respondent, on the

other hand, argued that the applicant failed to produce any evidence about the whereabouts of the child's biological parents as a joint reading of art 14(1)(b), s 1(a) of Part II of the Second Schedule and s 17 Part III of the Second Schedule of the Federal Constitution required it to be shown that those parents were not only legally married but that at least one of them was a citizen of, or permanently resident in, the Federation at the time of the child's birth. The respondent contended that unlike in some jurisdictions where legislation expressly dealt with an adopted child's right to acquire citizenship, adoption in Malaysia did not automatically confer on the child a right to citizenship by operation of law. The respondent also submitted that as the applicant had not exhausted all alternative remedies, such as applying for the child's citizenship by way of registration under art 15A of the Federal Constitution before seeking relief from the court, her application was premature and ought to be dismissed.

Held, dismissing the application:

(1) The respondent had not acted in error of law and/or in excess of jurisdiction and the decision was not unreasonable in the *Wednesbury* sense to render it liable to be quashed (see para 159).

(2) In order for the grant of citizenship by operation of law pursuant to art 14(1)(b) read together with s 1(a) of Part II of the Second Schedule of the Federal Constitution, the child must be born in the Federation to biological parents one of whom at least was at the time of the birth either a citizen or permanently resident in the Federation. Given the wording in art 14, the reference to the relationship of the child to the parents was to be determined with relation to the time of the child's birth. The word 'parents' in art 14 had to refer to the biological and lawful parents of the child. It was not in dispute that in the instant case the identity of the child's lawful and biological parents was unknown. Hence, the child in the instant case could not qualify as a citizen of this country by operation of law (see paras 103, 105–106 & 144).

(3) The Adoption Act 1952 contained no stipulation that an adoption order was to have any effect on the citizenship of a person. Although s 9 of that Act provided for the effect an adoption order had on matters of parental rights, future custody, maintenance and education including rights to appoint guardians, to consent to marriage and other rights, it had no express or implied reference to citizenship. Similarly, art 14 of the Constitution contained no reference to the implications of an adoption and whether an adopted child could be treated as being born to a lawful parent for the purposes of art 14. In jurisdictions that conferred right to citizenship by operation of law consequent upon the making of an adoption order, such provisions in the law were stated in express terms. If our Legislature had intended to make provision for citizenship by operation of law upon the granting of an adoption order, such intent

would have been expressly provided for. It was not the province of the court to read into the articles of the Constitution provisions that were not there (see paras 145–146, 148 & 154).

(4) The applicant failed to exhaust the alternative remedy open to her of applying for citizenship of the child by way of registration pursuant to art 15A of the Constitution. Not having exhausted this window of avenue, it was premature for the applicant to contend that the child was rendered 'stateless'. She had not brought herself within the enabling provisions of s 44 of the Specific Relief Act 1950 (see para 158).

[Bahasa Malaysia summary

Persoalan di hadapan Mahkamah Tinggi dalam kes ini adalah sama ada perintah pengangkatan seorang anak angkat didaftarkan sebagai warganegara Malaysia mengikut hak dan/atau melalui pelaksanaan undang-undang menurut perkara 14(1)(b) Perlembagaan Persekutuan. Pemohon di sini telah memperoleh perintah pengangkatan dari mahkamah sesyen untuk mengambil anak angkat kanak-kanak perempuan yang telah dilahirkan di Malaysia tetapi ditinggalkan oleh ibubapa kandungnya. Sijil kelahiran kanak-kanak itu menyatakan bahawa maklumat tentang ibubapa kandungnya tidak dapat diperolehi. Responden, setelah diperintahkan oleh mahkamah untuk mendaftarkan perintah pengangkatan, telah mengeluarkan sijil kelahiran baru untuk kanak-kanak itu yang mengklasifikasikannya sebagai 'non-citizen' walaupun pemohon telah didaftar dan dinamakan sebagai ibunya. Responden telah menolak permohonan pemohon untuk mendaftar kanak-kanak itu sebagai warganegara Malaysia dan menasihatkannya untuk membuat permohonan rasmi bagi kewarganegaraan sedemikian. Dalam memfailkan permohonan ini untuk menyemak semula keputusan responden tersebut, pemohon bergantung kepada perintah pengangkatan dan ss 9 dan 25A Akta Pengangkatan 1952 untuk menegaskan bahawa oleh kerana dia seorang warganegara Malaysia, kanak-kanak itu juga patut didaftarkan sebagai warganegara Malaysia kerana kesan perintah pengangkatan adalah untuk menganggap kanak-kanak itu sebagai dilahirkan kepadanya dalam talian perkahwinan yang sah. Pemohon berhujah bahawa jika responden tidak mendaftarkan kanak-kanak itu sebagai warganegara Malaysia kanak-kanak itu akan dianggap tanpa kerakyatan dan bahawa fakta itu mungkin menjejaskan kanak-kanak itu secara psikologi. Pemohon selanjutnya berhujah bahawa oleh kerana kanak-kanak itu telah dilahirkan di Malaysia dia merupakan warganegara di negara ini melalui pelaksanaan undang-undang di bawah perkara 14(1)(b) dibaca bersama Bahagian II kepada Jadual Kedua Perlembagaan Persekutuan. Responden, sebaliknya, berhujah bahawa pemohon gagal mengemukakan apa-apa keterangan tentang ibubapa kandung kanak-kanak itu sebagai bacaan bersama perkara 14(1)(b), s 1(a) Bahagian II kepada Jadual Kedua dan s 17 Bahagian III Jadual Kedua Perlembagaan Persekutuan menghendakinya bagi menunjukkan bahawa ibubapa tersebut

bukan sahaja telah berkahwin secara sah malah sekurang-kurangnya salah satu daripada mereka adalah warganegara, atau bermastautin secara tetap di Persekutuan itu pada masa kelahiran kanak-kanak itu. Responden berhujah bahawa tidak seperti dalam beberapa bidang kuasa di mana perundangan jelas memperkatakan tentang hak anak angkat untuk memperoleh kewarganegaraan, pengambilan anak angkat di Malaysia tidak secara automatik memberikan hak ke atas kanak-kanak itu melalui pelaksanaan undang-undang. Responden juga berhujah bahawa oleh kerana pemohon tidak menggunakan semua remedi alternatif, seperti memohon kewarganegaraan kanak-kanak itu melalui pendaftaran di bawah perkara 15A Perlembagaan Persekutuan sebelum memohon relief dari mahkamah, permohonannya adalah pramatang dan patut ditolak.

Diputuskan, menolak permohonan:

(1) Responden tidak bertindak secara salah dari segi undang-undang dan/atau melebihi bidang kuasa dan keputusan itu tidaklah tidak munasabah dalam ertikata *Wednesbury* untuk menjadikannya layak utuk dibatalkan (lihat perenggan 159).

(2) Bagi tujuan memberikan kewarganegaraan melalui pelaksanaan undang-undang menurut perkara 14(1)(b) dibaca bersama s 1(a) Bahagian II kepada Jadual Kedua Perlembagaan Persekutuan, kanak-kanak itu hendaklah lahir dalam Persekutuan kepada ibubapa kandung yang mana salah seorang daripada mereka sekurang-kurangnya pada masa kelahiran adalah seorang warganegara atau bermastautin secara tetap di Persekutuan itu. Berdasarkan perkataan-perkataan dalam perkara 14, rujukan kepada hubungan kanak-kanak itu kepada ibubapa itu mesti ditentukan berkaitan dengan masa kelahiran kanak-kanak itu. Perkataan 'parents' dalam perkara 14 perlu merujuk kepada ibubapa kandung dan sah kanak-kanak itu. Ia tidak dipertikaikan bahawa dalam kes ini identiti ibubapa kandung dan sah kanak-kanak itu tidak diketahui. Justeru, kanak-kanak dalam kes ini tidak layak sebagai warganegara negara ini melalui pelaksanaan undang-undang (lihat perenggan 103, 105–106 & 144).

(3) Akta Pendaftaran Pengangkatan 1952 tidak mengandungi ketetapan bahawa perintah pengangkatan mempunyai apa-apa kesan ke atas kewarganegaraan seseorang. Walaupun s 9 Akta tersebut memperuntukkan kesan untuk perintah pengangkatan ke atas perkara-perkara berhubung hak ibubapa, penjagaan masa depan, nafkah dan pendidikan termasuk hak melantik penjaga, untuk bersetuju kepada perkahwinan dan hak-hak lain ia tidak ada rujukan yang nyata atau tersirat kepada kewarganegaraan. Begitu juga, perkara 14 Perlembagaan tidak mengandungi rujukan kepada implikasi pengambilan anak angkat dan sama ada pengambilan anak angkat boleh dianggap sebagai

dilahirkan kepada ibubapa yang sah bagi tujuan perkara 14. Dalam bidang kuasa yang memberikan hak kewarganegaraan melalui pelaksanaan undang-undang berikutan suatu perintah pengangkatan yang dibuat, peruntukan-peruntukan sedemikian dari segi undang-undang telah dinyatakan dalam terma-terma yang nyata. Jika perundangan Malaysia tidak berhasrat untuk membuat peruntukan untuk kewarganegaraan melalui pelaksanaan undang-undang setelah memberikan perintah pengangkatan itu, niat sedemikian akan diperuntukkan dengan jelas. Ia bukan bidang kuasa mahkamah untuk membaca perkara dalam peruntukan-peruntukan Perlembagaan yang tiada (lihat perenggan 145–146, 148 & 154).

(4) Pemohon gagal menggunakan remedi alternatif yang tersedia untuknya dengan memohon kewarganegaraan kanak-kanak itu melalui pendaftaran menurut perkara 15A Perlembagaan. Dengan tidak menggunakan peluang ini, ia adalah pramatang untuk pemohon berhujah bahawa kanak-kanak itu dianggap 'stateless'. Dia tidak menyebabkan dirinya terangkum dalam peruntukan s 44 Akta Pelaksanaan Spesifik 1950 (lihat perenggan 158).]

Notes

For cases on adoption, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 3674–3701.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia [2012] 9 MLJ 573, HC (refd)

Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others [2007] 8 MLJ 1, HC (refd)

In re M (an infant) [1955] 2 QB 479, CA (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)

Lee Chin Pon & Anor v Registrar-General of Birth and Deaths, Malaysia unreported, HC (refd)

Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd [2009] 5 MLJ 14, CA (refd)

Lim Jen Hsian & Anor v Ketua Pengarah JPN & Ors MTKL 25-87-04 of 2014 (unreported) (refd)

Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame, Re [2005] HCA 36, HC (refd)

Nedunchelian V Uthiradam v Nurshafiqah Mah Singai Annal & Ors [2005] 2 CLJ 306, HC (refd)

Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor [2004] 2 MLJ

648; [2004] 2 CLJ 416, HC (refd)
Singh v Commonwealth Of Australia [2004] HCA 43, HC (refd)
Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & 2 lagi MTKL 25–91–05 of 2014 (unreported) (refd)
Tlhoro v Minister of Home Affairs [2008] NAHC 65, HC (refd)
Yu Sheng Meng v Ketua Pengarah Jabatan Pendaftaran Negara & Ors Kuala Lumpur High Court 25–117–06 of 2014 (unreported) (refd)

Legislation referred to

Adoption Act 1952 ss 9, 9(1), 25A
Adoption of Children Act 1939 [SG] s 7, 7(9)
Australian Citizenship Act 2007 [AUS] s 13
Births and Deaths Registration Act 1957 s 13
British Nationality Act 1981 [UK] ss 1(5), (5A), 1(6), 3(1)
Commonwealth of Australia Constitution Act 1900 [AUS]
Constitution of the Republic of Singapore [SG] arts 120, 121, 121(1), 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, Third Schedule, s 15(2)
Federal Constitution arts 14, 14(1)(b), 15, 15A, 16, 16A, 18, 18(2), 19, 22, 31 Second Schedule, Part II, ss 1(a), (e), 2(1), Part III, 1(a), 17
Law Reform (Marriage and Divorce) Act 1976
Legitimacy Act 1961 ss 3, 4
Specific Relief Act 1950 s 44

Loh Yeow Khoon (Goh Chek Kang with him) (Lim Kean Siew & Co) for the applicant.
Maisarah bt Juhari (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Collin Sequerah JC:

INTRODUCTION

[1] This application by the applicant raises the following main issue for determination:

> Whether by virtue of an adoption order, an adopted child is entitled as of right and/or by operation of law to be registered as a citizen of Malaysia pursuant to the provisions of Article 14(1)(b) of the Federal Constitution of Malaysia (Constitution)?

A BACKGROUND FACTS

[2] The applicant had on 9 July 2012 filed in a petition for adoption in the Georgetown Sessions Court for an adoption order to adopt a child who is known as 'Chin Jia Nee' ('the child') under the provisions provided in the Adoption Act 1952 (Act 257).

[3] The sessions court had on 9 November 2012, in the presence of the officer from Penang Social Welfare Department qua the guardian ad-litem to the child appointed by the sessions court on 10 August 2012 together with the applicant and the child, granted an adoption order of the child to the applicant and further ordered that the respondent register the adoption order accordingly ('adoption order').

[4] Subsequently, the sessions court had on 4 December 2012 forwarded a sealed copy of the adoption order to the respondent for their further action to register the adoption order.

[5] On 2 January 2013, the solicitors for the applicant received a letter from respondent dated 24 December 2012 to request for the original certificate of birth of the child, MyKid of the child, a duly completed Form JPN.AA04 and a copy of the applicant's certified true copy National Identity Card ('the documents') for the respondent's further action.

[6] Acting in accordance with the instructions of the respondent, the solicitors for the applicant forwarded the said documents to the respondent on 14 January 2013.

[7] On 5 March 2013, the respondent issued a new certificate of birth to the child and forwarded the same to the solicitors for the applicant on 18 March 2013. The respondent also informed the solicitors for the applicant to contact their office should the applicant have any query regarding the issuance of the new certificate of birth.

[8] After receiving the new certificate of birth from the solicitors for the applicant, the applicant was surprised to learn that the column of the nationality in respect of the child in the certificate of birth had been registered and stated as 'Bukan Warganegara' or non-citizen although the name of the applicant had been registered and named as the mother of the child.

[9] Thinking that there might be a mistake to the certificate of birth, the applicant directed her solicitors to write to the respondent on 22 March 2013 and returned to the respondent the certificate of birth in the expectation that

the respondent will register the child as a citizen of Malaysia by referring to the provisions provided under both the Adoption Act 1952 and the Federal Constitution.

[10] In view of the fact that the respondent had not given any feedback or reply to the applicant's solicitors' letter dated 22 March 2013, the solicitors for the applicant had further on 26 April 2013, 21 May 2013, 21 August 2013 and 18 October 2013 respectively written reminder letters to the respondent.

[11] After several reminder letters, the solicitors for the applicant finally received two letters dated 14 November 2013 and 6 December 2013 respectively from the respondent enclosing the same certificate of birth rejecting the application of the applicant in registering the child as a citizen of Malaysia. The respondent also advised the applicant to make a formal application for the citizenship of the child at the nearby National Registration Department.

[12] On 7 March 2014, the applicant together with the solicitors for the applicant received another letter from the respondent dated 28 February 2014 further requesting the applicant to make her application for the citizenship of the child at the nearby National Registration Department.

[13] The applicant instead filed in this application before this court to review the decision of the respondent in refusing to register the child as a citizen of Malaysia.

CONTENTIONS OF PARTIES

The applicant

[14] The applicant took the position that as the sessions court had granted the adoption order of the child to the applicant, the child is deemed to be a child born to the adopter, namely the applicant, in lawful wedlock. All rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the applicant as though the child was a child born to the applicant in lawful wedlock. As such, since the applicant is a citizen of Malaysia at all material times, the child should be automatically registered as a citizen of Malaysia.

[15] The applicant submits that the effect of an adoption order has been stated clearly in s 9 of the Adoption Act 1952 as follows:

> (1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, in relation to the future custody, maintenance and education of the adopted child,

A including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock.

B (2) Where, at any time after the making of an adoption order, the adopter or the adopted child or any other person dies intestate in respect of any movable or immovable property, that property shall devolve in all respects as if the adopted child were the child of the adopter born in lawful wedlock and were not the child of any other person.

C ...

(8) For the purposes of any written law for the time being in force in Malaysia or any part of it relating to compensation to families for loss occasioned by the death of a person caused by actionable wrong, a person shall be deemed to be the parent or child of the person deceased D notwithstanding that he was only related to him in consequence of adoption; and accordingly in deducing any relationship which under such legislation is included within the meaning of the expressions 'parent' and 'child' an adopted child shall be treated as being the child of the adopter born in lawful wedlock and not the child of any other person.

E

[16] The applicant further relied on s 25A of the Adoption Act 1952 which states that:

(1) In respect of the Certificate of Birth referred to in paragraph 25(2)(b), every F adoption order shall contain a direction –

(a) to the Registrar General that the word 'adopted', 'adopter' or 'adoptive' or any word to like effect shall not appear in the Certificate;

G ...

(5) The Certificate of Birth issued under this Act pursuant to an adoption order shall replace the Certificate of Birth of the child issued under the Births and Deaths Registration Act 1957, and shall for all purposes be known as the Certificate of Birth of the child.

H (6) Notwithstanding anything to the contrary in any written law, the Certificate of Birth under this Act, if given under the hand of the Registrar General or any person authorized by him, shall be received without further or other proof as evidence of the facts and particulars relating to the birth of the child in respect of whom the Certificate of Birth was issued.

I

[17] By reading ss 9 and 25A of the Adoption Act 1952 together, the applicant asserts that the intention of Parliament is clear in that s 25A of the Adoption Act 1952 had been amended in the year 2000 to prevent the possibility that knowledge of the fact of being adopted would have an adverse

psychological effect on an adopted child. As such, once an adoption order is granted by the court, a new certificate of birth shall be issued to the child concerned without the word 'adopted', 'adopter' or 'adoptive' or any word to like effect and that the said child shall be deemed to be born to the adopter in lawful wedlock. In other words, the adopter shall be deemed as the biological parent to the child at all material times.

[18] The applicant submits that since the sessions court has granted the adoption order of the child to the applicant, the applicant shall be deemed as the biological mother to the child as if that the child had been born to the applicant in lawful wedlock.

[19] If the respondent refuses to register the child as a citizen of Malaysia, it will defeat the very purpose of the amendment to s 25A of the Adoption Act 1952 as it will definitely lead to the knowledge of the child that the child is adopted which might subsequently or probably have an adverse psychological effect on the adopted child. They contend that the child would be adversely affected or psychologically affected because of the real possibility of a lingering question in the mind of the child as to why if the applicant is a citizen, she is not classified as a citizen as well.

[20] Moreover, s 9(1) of the Adoption Act 1952 clearly states that all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, in relation to the future custody, maintenance and education of the adopted child shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock. Therefore, the applicant can only provide and exercise the rights, duties, obligations and liabilities of a parent, particularly in relation to the education of the child should the child be recognised and registered as a citizen of Malaysia.

[21] Further, art 14(1)(b), Part II Second Schedule 1(a) and (e) of the Federal Constitution provides that:

> (a) every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation;
>
> ...
>
> (e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

[22] In view of the fact that the child has been deemed as if that she has been born to the applicant in lawful wedlock and since the applicant is at all the material times a citizen of Malaysia, the child shall also be deemed as a citizen of Malaysia.

[23] Besides, there has been no dispute and it has been clearly stated in the certificate of birth that the child is born in Kluang, Johor, Malaysia. As such, the applicant contends that the child should be automatically registered by the respondent as a citizen of Malaysia as the child is in fact at all material times a citizen of Malaysia by operation of law pursuant to art 14(1)(b) Part II Second Schedule 1(a) and 1(e) of the Federal Constitution.

[24] The applicant relied further on the case of *Lee Chin Pon & Anor v Registrar-General of Birth and Deaths, Malaysia* (2010), unreported but cited in the Malayan Law Journal Article *Citizenship for Adopted Children – A Malaysian Perspective* [2013] 1 MLJ xiii, where the High Court in a judicial review application held as follows:

(a) that the child is a citizen of Malaysia by operation of law by virtue of his lawful adoption by the applicants pursuant to the Order for adoption read with Sections 9 and 25A of the Adoption Act 1952 and Article 14(1)(b) Part II Second Schedule (a) of the Federal Constitution;

(b) that the child is a citizen of Malaysia by operation of law by virtue of his birth within the Federation of Malaysia pursuant to Article 14(1)(b) Part II Second Schedule (e) of the Federal Constitution;

(c) that the respondent did not have the jurisdiction to refuse to register the child as a citizen of Malaysia in his new birth certificate;

(d) that the respondent had acted in error of law and in excess of his jurisdiction by rendering the child stateless;

(e) that the respondent committed an error of law by taking into account that the child natural parents are not known, which is a totally irrelevant consideration;

(f) that the respondent has acted in disregard of the applicants' legitimate expectation that the respondent would issue a new birth certificate registering the child as a citizen of Malaysia; and

(g) that the respondent's decision is an error of law because the respondent had acted unreasonably (in the *Wednesbury* sense), that is, so unreasonably that no reasonable authority would have made such a decision to deprive the child of his Malaysian citizenship.

[25] By applying the facts in the case of *Lee Chin Pon & Anor* to the present case here, the applicant contends that it is not disputed that the child was born in Kluang, Malaysia at all material times as shown in the birth certificates in exhs CKN5 and CKN6 of the applicant's affidavit and that the child is not a citizen of any other country since the child was born. In view of the fact that the child has been adopted by the applicant through the adoption order dated 9 November 2012, the child is deemed to be born in a lawful wedlock to the applicant. Therefore, the child has fulfilled the requirement under art 14(1)(b)

Part II Second Schedule s 1(a) and (e) of the Federal Constitution as mentioned above and should be recognised and registered as a citizen of Malaysia.

[26] However, they also quite rightly and properly drew attention to the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573, where the High Court had dismissed the application for judicial review in respect of the decision of the Registrar of Birth's and Death's, Malaysia, in refusing to register the adopted child as a citizen of Malaysia based on, inter alia, the following grounds:

(a) the adopted child therein although the biological child of the adopted father, cannot qualify as a citizen by operation of law under art 14(1)(b) of the Federal Constitution as the adopted biological father and the biological mother were not legally married when the adopted child was born; and

(b) since the adopted child is an illegitimate child, the word parent s 17 under art 14(1)(b) of the Federal Constitution shall mean the biological mother but not the adopted biological father in accordance with of Part III of the Second Schedule of the Federal Constitution.

[27] It is the applicant's submission that the case of *Foo Toon Aik* is distinguishable as the facts are different in that here the applicant is a single adopter and the applicant was not married at all material times. Therefore, the issue of whether or not the applicant is lawfully married when the child was born and whether or not the child is an illegitimate child are not applicable here. Therefore, the issue of biological parents does not arise here.

[28] In light of the fact that the child had been lawfully adopted, the child shall be deemed to be a child born in a lawful wedlock under s 9 of the Adoption Act 1952, and the word parent under art 14(1)(b) of the Federal Constitution shall mean the adopter only. Therefore, the child shall be deemed, recognised and registered as a citizen of Malaysia since the applicant is also a citizen of Malaysia. Otherwise, the applicant submits that the respondent would have acted in error of law and in excess of their jurisdiction by rendering the child stateless.

[29] The applicant's submit that it is not the child's fault that the child was abandoned ever since she was born which subsequently led to the adoption by the applicant. Thus, it would be a grave injustice and ridiculous if the child is punished in not being recognised and registered as a citizen of Malaysia but on the contrary, rendered stateless as a result of being abandoned by her biological parents.

The respondent

[30] It was the respondent's submission that the applicant's claim has failed to fulfill the conditions and requirement stated under arts 14(1)(b) and 15A of the Federal Constitution for acquisition of citizenship by operation of law and by way of registration (which the applicant had never applied for).

[31] The respondent submitted that Part III of the Federal Constitution provides four methods by which citizenship may be acquired, namely by operation of law under art 14, by registration under arts 15, 15A, 16, 16A, and 18, by naturalisation under art 19 and by incorporation of territory under art 22 of the Federal Constitution.

[32] Article 14 must be read together with art 18(2) of the Federal Constitution which provides that approval from the Federal Government must be obtained prior to registration of a person as a citizen of Malaysia.

[33] Article 14 of the Federal Constitution is to be read together with Part II of the Second Schedule which reads:

> Citizenship by operation of law
>
> 14 (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
>
> (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part 1 of the Second Schedule; and
>
> (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.
>
> Part II Second Schedule
>
> CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY
>
> Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say
>
> (a) every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation; and
>
> (b) ...; and
>
> (c) ...; and
>
> (d) ...; and
>
> (e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

[34] Therefore, based on art 14(1)(b) read together with Part II of the Second Schedule, s 1(a), there are two requirements to be fulfilled:

(a) every person born within the Federation; and

(b) whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation

[35] Upon reading both of the said provisions, it indicates clearly that the origin of the paternal and maternal side of the said child must be ascertained and also the existence of marriage and registration of marriage must be proven besides the place of birth of the said child in order to acquire citizenship by operation of law.

[36] The respondent further submitted that in accordance with the Births and Deaths Registration Act 1957, every birth of a child will be registered and birth certificate will be issued regardless of whether the said child is a citizen or not as the function of the birth certificate is only to indicate the time, place and the biological parents of the child and it is irrelevant whether the child or the parents are citizens or otherwise.

[37] The respondent submitted that although it was not in dispute that the child was born in Malaysia the child does not fulfill the requirement according to the wording 'his parent, or to one of his parents' for citizenship by operation of law to be granted.

[38] In support thereof the respondent relied upon the definition of 'parent' in the case of *Neduncheliyan v Uthiradam v Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306 as follows:

> Though under art 160(1) the singular includes the plural nevertheless the placement of the word parent in the singular clearly gives rise as to whether it was intentionally inserted as such to be read in the singular. Interestingly enough art 160B expressly states that the authoritative text of the Constitution is the Bahasa text and hence when the equivalent term of parent which is 'ibu bapa' in the Bahasa text is construed it invariably is interpreted in the singular sense as the plural sense would be kedua ibu bapa in the Bahasa text. That being the case the intention of the framers of the Constitution in placing the word parent in the singular clearly intended it to be such.

[39] The respondent further referred to the case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648; [2004] 2 CLJ 416 which quoted the definition of 'parent' from *Black's Law Dictionary Abridged* (6th Ed) (Centennial Edition 1891–1991) as 'the lawful father or mother of a person'.

[40] In further support of the proposition that lawful parent refers to the biological father and mother in a valid marriage the respondent also referred to s 13 of the Births and Deaths Registration Act 1957 which states that:

> 13 Provisions as to father of illegitimate child
>
> Notwithstanding anything in the foregoing provisions of this Act, in the case of an illegitimate child, no person shall as father of the child be required to give information concerning the birth of the child, and the Registrar shall not enter in the register the name of any person as father of the child except at the joint request of the mother and the person acknowledging himself to be the father of the child, and that person shall in that case sign the register together with the mother

[41] In still further support the respondent referred to ss 3 and 4 of the Legitimacy Act 1961 which provides as follows:

> 3 Conditions of application of Act
>
> (1) Nothing in this Act shall operate to legitimate a person unless the marriage leading to the legitimation was solemnised and registered in accordance with –
>
> (a) the Civil Marriage Ordinance 1952 (44/52), or the Christian Marriage Ordinance 1956 (33/56);
>
> (b) the Christian Marriage Ordinance (Cap. 24) or the Marriage Ordinance 1959 (14/59), of Sabah; or
>
> (c) the Church and Civil Marriage Ordinance of Sarawak (Cap. 92), or any Enactment or Ordinance repealed by any of the said Ordinances.
>
> (2) (Repealed by Act 164.)
>
> (3) The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in property save as hereinafter in this Act expressly provided.

[42] The respondent submitted that there was no information forthcoming pertaining to the said child's biological father and mother respectively and neither did the applicant make any averments or produce evidence in the affidavits on attempts made to ascertain the whereabouts of the child's biological parents.

[43] The respondent went on to submit that the applicant cannot argue that there is a legitimate expectation that the child ought to be conferred Malaysian citizenship since her birth is premised on the core requirement that the applicant's biological father and mother (which such information is unavailable) was properly and legally married under the law. This was a cardinal

requirement under art 14(1)(b) and s 1 of Part II of the Second Schedule of the Constitution.

[44] The respondent referred to s 17 Part III Second Schedule of the Federal Constitution which states that:

> For the purpose of Part III of this Constitution references to a person's father or to his parent, or to one of this parents, are in relation to a person who is illegitimate to be construed as references to his mother, and accordingly section 19 of this Schedule shall not apply to such a person.

[45] Section 17 provides that in circumstances where a person is illegitimate references to the person's father or parent, or to one of his parents referred in Part III of the Federal Constitution (which covers art 14(1)(b) of the Constitution), is to be construed to refer to the person's mother.

[46] The respondent's submitted that s 17 of Part III Second Schedule of the Constitution must be read together with art 14(1)(b) of the Constitution and s 1(a) of the Second Schedule. The justification for such a construction is in compliance with art 31 of the Constitution which provides:

> Application of Second Schedule
>
> Until Parliament otherwise provides, the supplementary provisions contained in Part III of the Second Schedule shall have effect for the purpose of this Part.

[47] The respondent also placed reliance upon the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia*.

[48] The respondent further submitted that the decision under Part III FC (art 14 of the Constitution) was a matter that was non-justiciable as provided under s 2 Part III of the Second Schedule of the Constitution in that no appeal or review can be made against the Federal Government's decision. The provision is applicable to an application for citizenship under art 14(1)(b) of the Constitution.

[49] It was contended by the respondent that the first 'qualification' in art 14 is the 'primary rule' conferring the right of citizenship by operation of law by the jus soli of the father. This was a rule conceived in a social contract by which the state recognised the natural law right of a citizen to have his offspring becoming a citizen after him. However, such principle must be read as a whole with the intention of Parliament when such provision was drafted as the jus soli of the father requires evidence of a marriage being registered before such principle can be applied.

[50] The respondent submitted that s 1(e) of Part II Second Schedule of the Federal Constitution is inapplicable to the applicant's case and cannot be used as a ground to issue a citizenship status under operation of law. The reason is due to the reading of s 1(e) of the Second Schedule of the Constitution which clearly states that the status of citizenship by operation of law must be based on the citizenship of the biological parents. Reference was made to exh CKN5 of the applicant's affidavit (I) where the original birth certificate before the said adoption order was taken was exhibited. The contents of the said birth certificate clearly states that the information of the biological parents' information cannot be obtained (*maklumat tidak diperolehi*).

[51] The respondent submitted that the words in s 1(e) of Part II, Second Schedule of the Federal Constitution which reads 'every person born within the Federation who is not born a citizen of any country' must relate to the citizenship of the biological parents of the said child.

[52] As information about the biological parents were unavailable, s 1(e) of Part II, Second Schedule of the Federal Constitution does not apply as it does not fulfill the requirements of s 1(e) of Part II, Second Schedule of the Federal Constitution.

[53] The respondent submitted that the reading of art 14(1)(b) Federal Constitution together with s 1(e) of Part II, Second Schedule of the Federal Constitution is based on the principle of jus soli which was the intention of the drafters of the Constitution. The intention of the drafters was that the principle of jus soli is upheld and thus the determination of the origin of the biological parents must be ascertained and that this does not at all cover persons who are the guardians or custodians or even the adopters of the person acquiring the citizenship status.

[54] The respondent's submitted the case of *Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others* [2007] 8 MLJ 1 where the High Court had observed the reason behind the provision in art 14 of the Constitution:

> It is at once discernible that the first 'qualification' in art 14 is in fact the 'primary rule' conferring the right of citizenship by operation of law by the jus soli of the father. It is a rule conceived of a social contract by which the State recognised the natural law right of a citizen to have his offspring become a citizen after him. The 'qualification' requiring that the birth must be registered within a year or such longer period as the Federal Government may allow is but a 'secondary rule' to help interpret the primary rule.

[55] With regard to the case of *Lee Chin Pon & Anor v Registrar-General Of Births And Deaths Malaysia*, cited by the applicant's, the respondent submitted

that in deciding that the child acquired citizenship by operation of law upon adoption, the judge interpreted the word 'parents' under para (a) of s 1 of Part II as referring to the adoptive parents, contrary to the interpretation under s 17 of Part III. This came about as a result of the judge's liberal interpretation of s 9 of Act 257.

[56] Hence, the reading of the adopted parents as 'parents' in art 14(1)(b) of the Constitution or even s 17 Part III Second Schedule was erroneous and was never provided for under s 17 Part III Second Schedule of the Constitution.

[57] The respondent's finally cited the recently decided cases of *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & 2 lagi* MTKL 25–91–05 of 2014 and *Lim Jen Hsian & Anor v Ketua Pengarah JPN & Ors* MTKL 25–87–04 of 2014 where the High Court had dismissed similar applications for citizenship by operation of law, principally on the grounds that there was no evidence placed before the court that the child was stateless and that the fact of adoption did not automatically confer a right to citizenship by operation of law.

[58] The respondents resorted to various provisions and cases from other Commonwealth jurisdictions in order to show that the grant of adoption does not necessarily and automatically confer citizenship status and the position in these jurisdictions must be differentiated with the provision laid down in Malaysia.

United Kingdom

[59] In the United Kingdom, Part I of the British Nationality Act 1981 (1981 Chapter 61) lays down several ways of acquiring British citizenship, namely by way of acquisition by birth or adoption, acquisition by registration, acquisition by naturalisation and acquisition by descent.

[60] Citizenship by adoption is provided for under sub-ss 1(5) and (5A) of the British Nationality Act 1981 until it was repealed in 2002. In regards to the acquisition of British citizenship by adoption (as it was then), sub-s 1(5) of the British Nationality Act 1981 provided two circumstances whereby an adopted child who is not a British citizen, can become a British citizen. Paragraph 1(5)(a) provides for domestic adoption, while para 1(5)(b) provides for inter-country adoption.

[61] The respondent submitted that sub-ss 1(5) and (5A) of the British Nationality Act 1981 have to be read together. An adopted minor who is not a British citizen shall be a British citizen from the date of the adoption order if the

adopter, or in the case of a joint adoption, one of the adopters is a British citizen.

[62] Paragraph 1(5)(a) and sub-s 1(5A) of the British Nationality Act 1981 read as follows:

> (5) Where –
>
> (a) any court in the United Kingdom (or, on or after the appointed day, any court in the qualifying territory) makes an order authorizing the adoption of a minor who is not a British citizen; or
>
> (b) ...
>
> that minor shall, if the requirements of sub section (5A) are met, be a British citizen as from the date on which the order is made or the Convention adoption is effected, as the case may be.
>
> (5A) Those requirements are that on the date on which the order is made or the Convention adoption is effected (as the case may be)–
>
> (a) the adopter or, in the case of a joint adoption, one of the adopters is a British citizen; and
>
> (b) in a case within sub section 5 (b), the adopter or, in the case of a joint adoption, both of the adopters are habitually resident in the United Kingdom.

[63] Further, sub-s 1(6) of the British Nationality Act acts as a safeguard as it maintains a person's citizenship, who by virtue of sub-s 1(5) of the Act became a British citizen, even after the adoption order ceases to have effect.

[64] If then all else fails, sub-s 3(1) of the British Nationality Act 1981enables the Secretary of State to register a person as a British citizen whilst they are a minor 'if he sees fit'. This is similar to art 15A of the Federal Constitution submitted the respondent.

[65] Thus, it appears that the British Nationality Act 1981 expressly provides that an adopted child becomes a British citizen upon adoption by an adopter who is a British citizen, or in the case of a joint adoption one of the adopters is a British citizen.

[66] By way of comparison, the Federal Constitution of Malaysia does not make any such express provision for the adoptee to acquire citizenship automatically once an adoption order is obtained. The same goes for the other provisions in other statutes in Malaysia. This is in line with the judgment in the

case of *Foo Toon Aik*.

Singapore

[67] In Singapore, matters relating to citizenship are stipulated under Part X (arts 120–141) of the Constitution of the Republic of Singapore ('the Singapore Constitution'). The Third Schedule of the Singapore Constitution provides for supplementary provisions on citizenship. The Third Schedule should be read together with Part X as provided under art 140 of the Singapore Constitution as follows:

> 140 Application of Third Schedule
>
> Until the Legislature otherwise provided by law, the supplementary provisions contained in the Third Schedule shall have effect for the purposes of this Part.

[68] Article 121(1) of the Singapore Constitution provides:

> every person born in Singapore after 16 September 1963, shall be a citizen of Singapore by birth', and at the time of his birth, either one of his parents is a Singapore citizen.
>
> 121 Citizenship by birth
>
> (1) Subject to this Article, every person born in Singapore after 16th September 1963 shall be a citizen of Singapore by birth.
>
> (2) A person shall not be a citizen of Singapore by virtue of clause (1) if at the time of his birth –
>
> (a) his father, not being a citizen of Singapore, possessed such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the President;
>
> (b) his father was an enemy alien and the birth occurred in a place then under the occupation of the enemy; or
>
> (c) neither of his parents was a citizen of Singapore.
>
> (3) Notwithstanding clause (2)(c), the Government may, where it considers it just and fair and having regard to all the circumstances prevailing at the time of the application, confer citizenship upon a person born in Singapore.

[69] For the purposes of Part X, the reference to a person's father or to his parent or to one of his parents in the case of an adopted child is a reference to his adopter. This is specifically provided for under sub-s 15(2) of the Third Schedule of the Singapore Constitutionas follows:

> 15 Illegitimate children and adopted children
>
> (1) ...

(2) In relation to an adopted child who has been adopted by an order of a court in accordance with the provisions of any law in force in Singapore, references to a person's father or to his parent or to one of his parents shall be construed as references to the adopter.

[70] The respondent submitted that the application of the Third Schedule is subject to any other law that the Legislature may pass. In this case, the Legislature had passed the Adoption of Children Act 1939 (Chapter 4) (Revised Edition 2012) ('the Adoption Act'). Subsection 7(9) of the Adoption Act at provides that an adoption order shall not by itself affect the citizenship of the adopted child. This would mean that an adopted child who is not a citizen of Singapore at the time of the adoption would not automatically become a citizen upon the adoption. Section 7 reads:

7 Effect of adoption order

(1) Upon an adoption order being made –

(a) all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished;

(b) all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock; and

(c) in respect of the same matters and in respect of the liability of a child to maintain its parents, the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock,

except that in any case where 2 spouses are the adopters, such spouses shall, in respect of the matters in paragraphs (a) to (c) and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother respectively...

... *(9) An adoption order shall not by itself affect the citizenship of the adopted child.* (Emphasis added.)

[71] The position was clarified by the Minister for Social Affairs during the tabling of the Adoption of Children (Amendment) Bill 1972 as follows:

The citizenship status of the adopted infant is not spelt out in the Act. Because of this, many people are under the impression that legal adoption automatically awards citizenship of the adoptive parents to the adopted infant. Amendment to section 6 of the principal Act seeks to clarify the position of adoption does not affect

the nationality or citizenship of the adopted infant. This amendment will bring the Act in line with the local citizenship law under which even a natural child of a Singapore citizen parent, born outside the Republic, does not automatically assume the citizenship of his parents.

[72] Thus, an adopted child will not automatically acquire citizenship by birth under art 121 of the Singapore Constitution upon adoption as the adoption does not affect the citizenship of the adopted child, as provided in sub-s 7(9) of the Adoption Act.

[73] The respondent submitted therefore that the position in Singapore was similar to that in Malaysia where an adopted child does not acquire an automatic right to citizenship by operation of law upon adoption.

Australia

[74] In Australia, submitted the respondent, the relevant law governing Australian citizenship is the Citizenship Act 2007 since the Commonwealth of Australia Constitution Act 1900 makes no reference with regard to citizenship. The Citizenship Act 2007 governs Australian citizenship in all parts of Australia.

[75] The Citizenship Act 2007 provides specifically for the automatic acquisition of Australian citizenship by way of adoption. An adopted child becomes an Australian citizen by operation of law upon adoption if he satisfies the conditions of adoption under s 13 of the Citizenship Act 2007.

[76] Section 13 of the Citizenship Act 2007 is applicable to both domestic adoption and inter-country adoption. In order to be an Australian citizen by adoption under s 13 of the Citizenship Act 2007, the following requirements must be fulfilled:

(a) the person must be adopted under the law in force in any State or Territory of Australia;

(b) the person must be in Australia as a permanent resident at that time; and

(c) the adopter must be an Australian citizen, or in a case of a joint adoption, at least one of them must be an Australian citizen, at the time of the adoption.

[77] Section 13 of the Australian Citizenship Act states:

13 Citizenship by adoption

A person is an Australian citizen if the person is:

(a) adopted under a law in force in a State or Territory; and

(b) adopted by a person who is an Australian citizen at the time of the adoption or by 2 persons jointly at least one of whom is an Australian citizen at that time; and

(c) present in Australia as a permanent resident at that time.

[78] Therefore, only an adopted person who fulfils the requirements of s 13 of the Citizenship Act 2007 (which has been specifically provided for) is conferred Australian citizenship upon his adoption.

[79] The respondent submitted therefore that in the absence of any express provision on the rights of an adopted child in respect of citizenship unlike in the UK and Australia, it can be said that the adopted child does not acquire automatic citizenship upon adoption.

[80] The respondent cited the case of *Yu Sheng Meng v Ketua Pengarah Jabatan Pendaftaran Negara & Ors Kuala Lumpur High Court* 25–117–06 of 2014 (unreported) decided by Justice Asmabi Mohamed where in allowing the respondents' application to strike out the applicants' originating summons, had correctly held that an adoption order does not have an automatic effect on the application for citizenship by operation of law and that the remedy of the child may lie elsewhere viz art 15A of the Federal Constitution.

[81] In this case, *Yu Sheng Meng* was the adopted father of a child name of Yu Meng Queng. After obtaining an adoption order, the applicant insisted in obtaining citizenship status vide operation of law based on the adoption order obtained and filed the said originating summons to the said effect. The basis of the application was premised on ss 9 and 25A of the Adoption Act.

[82] However, the High Court made an observation that the provisions on citizenship and adoption were similar to Singapore and it can be deduced that it was never the intention of the Legislature to give such automatic rights as it will be a direct breach to the provisions pertaining to citizenship in the Federal Constitution itself.

[83] Thus, the respondent submitted that there was nothing in ss 9 and 25A of Act 257 to show that an adoption order had any effect other than that pertaining to the maintenance, education, welfare and property of the child.

[84] The respondent also submitted that the applicant had not exhausted all alternative remedies by applying for citizenship under art 15A of the Federal Constitution before seeking relief from the court.

[85] The respondent submitted that there were various types of citizenship provided for under the Federal Constitution. The applicant's application however, were only made under art 14(1)(b) of the Constitution which is for citizenship by operation of law. The applicant, submitted the respondent, had another option available under art 15A of the Constitution.

[86] The Federal Government has the sole discretion to grant citizenship under art 15A of the Constitution. The granting of citizenship was based on the policies of the Federal Government and their sole discretion, whether they are political, economic, social and cultural considerations. It was submitted therefore that this honourable court was not in any position to assess such policy considerations. Nonetheless there were no attempts made by the applicant to apply for citizenship under art 15A of the Constitution.

[87] In support of their contention that the court will not grant a declaratory relief where an adequate alternative remedy is available, the Court of Appeal decision in *Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd* [2009] 5 MLJ 14 was cited in support.

[88] It was therefore contended that this application was premature.

ANALYSIS AND FINDINGS

[89] From a consideration of the submissions advanced by both parties, it is evident that the outcome of the main issue posed earlier falls to be determined by the resolution of the following:

(a) whether the word 'parents' in s 1(a) of Part II Second Schedule of the Federal Constitution refer to biological and lawful parents?

(b) whether an adoption order operates to automatically confer the right to citizenship by operation of law? and

(c) does the availability of an alternative remedy preclude this application from being made?

Whether the word 'parents' in s 1(a) of Part II Second Schedule of the Federal Constitution refer to biological and lawful parents?

[90] Article 14 of the Constitution provides for citizenship by operation of law. It reads as follows:

Part III

CITIZENSHIP

Chapter 1 Acquisition of Citizenship

14 Citizenship by operation of law

(1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:

(a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and

(b) *every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.* (Emphasis added.)

[91] Part II of the Second Schedule reads as follows:

PART II

(Article 14(1)(b))

CITIZENSHIP BY OPERATION OF LAW OF PERSONS BORN ON OR AFTER MALAYSIA DAY

1 Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:

(a) *every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation; and*

(b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and

(c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and

(d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph; and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph. (Emphasis added.)

[92] From a reading of art 14(1)(b) read together with Part II of the Second Schedule s 1(a), it is evident that the twin requirements to be satisfied in order to fulfill the requirements of the section are as follows:

(i) the person is born within the Federation after Merdeka Day: and

(ii) whose parents one at least is *at the time of the birth* either a citizen or permanently resident in the Federation. (Emphasis added.)

[93] Further, from the wordings in art 14(1)(b) read together with Part II of the Second Schedule s 1(a) it is evident that the relationship of the child to the parents is to be determined with relation to the time of birth of the child. The issue for consideration therefore is whether this is to be construed to be a reference to the biological and lawfully married parents of the child?

[94] On a plain reading of the said wordings in the said article, it would appear that the word 'parents' has to refer to the legal and biological parents of the child. I am fortified in my reasoning by what was held in the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia* [2012] 9 MLJ 573 as follows:

(1) Before a person can qualify as a citizen by operation of law, he must be born to a lawful parent under art 14 of the Constitution. The word 'parent' in art 14 must refer to lawful parent. The child here could not qualify as a citizen by operation of law because he was not born to a lawful parent (see paras 10–11).

(2) The emphasis of the requirement under art 14 has to be placed on his birth status because art 14 clearly refers to the fulfillment of the requisite conditions at the time of his birth. It could not be disputed that his birth status did not qualify him to be a citizen by operation of law (see para 11).

(3) Pursuant to s 17 of Part III of the Second Schedule of the Federal Constitution, in a case of an illegitimate child, as in this case, the word parent refers to his mother and not the biological father, the applicant (see para 18).

(4) There is no specific mention on the implication of the adoption order on issue of citizenship of a person, under the Adoption Act. The law is silent on matters of citizenship of an adopted child. Without any expressed provision in the law to say that an adoption order has implication on the citizen of the adoptive child, such implication cannot be simply read into the law (see para 23).

[95] Although the factual matrix of the case is slightly different, the issues that arose for consideration are similar to the issues presently before this court. In *Foo*'s case, the main issues which arose for consideration were:

(i) whether the child qualified to be a citizen by operation of law;

(ii) whether an adoption order suffices to qualify an adoptive child as citizen

by operation of law under art 14(1)(b) of the Federal Constitution ('Constitution'); and

(iii) whether a writ of mandamus can be issued against the respondent to register the child as citizen resulting for the adoption order.

[96] As the issues to be determined are similar, I therefore find that there is no merit in the submissions advanced by the applicant that the instant case is distinguishable.

[97] These issues (in *Foo*'s case) arose out of the following facts. A male child was born in Malaysia out of a relationship between a male citizen of Malaysia and a Thai national. Their union was not registered under the governing law of Thailand nor in Malaysia under the provisions of the Law Reform (Marriage and Divorce) Act 1976. Their relationship ended over time and the mother of the child relinquished her parental rights over the child and returned to Thailand. The father of the child then made an application for and obtained an adoption order of the child pursuant to the Adoption Act 1952. He then applied to the National Registration Department for a new birth certificate to be issued. The new certificate was issued citing the child's citizenship as a non-citizen, 'bukan warganegara'.

[98] An application was then made by the father of the child to quash inter alia, the decision of the National Registration Department. The applicant contended that pursuant to the adoption order, the child should be issued with a birth certificate of his adoptive parent. It was also contended that by virtue of the adoption order the child should be treated as if he were born to the applicant like his natural child. Therefore the child would qualify and be deemed to be born to a parent either one of whom is a citizen of Malaysia, as envisaged by art 14 of the Constitution.

[99] The respondent however (in *Foo*'s case), relied on the definition of the word 'parent' in *Stroud's Judicial Dictionary of Words and Phrases* (7th Ed), which defines that the word 'parent' cannot include a father of an illegitimate child. They also placed reliance upon the decision by Lord Denning MR in *In re M (an infant)* [1955] 2 QB 479. The respondent also referred to the case of *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor* [2004] 2 MLJ 648; [2004] 2 CLJ 416, where the court relied on *Black's Law Dictionary Abridged* (6th Ed), which defines parent as 'the lawful father and mother of the person'. The respondent therefore submitted that from all these definitions it is clear that the word 'parent' in art 14 of the Federal Constitutionrefer to a lawful parent in a recognised marriage in the Federation.

[100] The court in adopting the arguments advanced, held, inter alia, that it is quite clear from the provisions cited that before a person can be qualified as a citizen by operation of law, he must be born to a lawful parent under the said art 14. Since there is no specific definition of the word 'parent' in the Federal Constitution, the dictionary meaning cited would have to be resorted to. The dictionary meaning of the word 'parent' must therefore refer to lawful parent. The court therefore agreed with the contention of the respondent that the word 'parent' in art 14 must refer to lawful parent. The court thus held the child there cannot qualify as a citizen by operation of law because he was not born to a lawful parent.

[101] The court further held (in *Foo Toon Aik*'s case), that the emphasis of the requirement under art 14 has to be placed on his birth status because the said art 14 clearly refers to the fulfilment of the requisite conditions at the time of his birth. It could not be disputed that his birth status did not qualify him to be a citizen by operation of law.

[102] The court also held that pursuant to s 17 of Part III of the Second Schedule of the Constitution, in the case of an illegitimate child, as was the case here, the word parent refers to his mother and not the biological father, the applicant.

[103] I find myself driven to adopting a similar construction for the reasons advanced. As earlier alluded to, given the wording contained in art 14, the reference to the relationship of the child to the parents is to be determined with relation to the time of birth of the child.

[104] The words employed in s 1(a) Part II Second Schedule, ie 'every person born within the Federation of whose parents one at least is at the time of the birth either a citizen or permanently resident in the Federation' would further underscore the fact that the time with respect to which the citizenship is to be determined is to be decided by reference to the time of birth.

[105] I therefore find that the word 'parent' in art 14 has to refer to the biological and therefore a lawful parent of the child. This also holds true in the case of a child born under s 1(e) Part II, Second Schedule as the word 'born' must be determined by reference to a child born to biological and lawful parents. To underscore this position s 2(1) Part II, Second Schedule reads as follows:

> A person is not a citizen by virtue of paragraph (a), (d) or (e) of section 1 if, at the time of his birth, his father, not being a citizen, possesses such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the Yang di-Pertuan Agong, or if his father is then an enemy alien and the birth occurs in a place under the occupation of the enemy.

[106] It will be observed that a person is not a citizen by virtue of para (e), if at the time of his birth, his father is subject to any of the disqualifications mentioned. The relationship of the child to the father in para (e) is again determined by reference to the time of the birth and therefore has to refer to the biological and lawful parent of the child. It is not in dispute that the identity of the child's lawful and biological parents here are unknown. Therefore the child born to the applicant here cannot qualify as a citizen of this country by operation of law.

[107] The applicant on the other hand, placed reliance on the unreported case of *Lee Chin Pon & Anor v Registrar-General of Birth And Deaths, Malaysia* (2010) but cited in the Malayan Law Journal Article 'Citizenship for Adopted Children – A Malaysian Perspective' [2013] 1 MLJ xiii, where the High Court in granting leave and allowing the applicants in the said case to file an application for judicial review, held as follows:

(a) that the child is a citizen of Malaysia by operation of law by virtue of his lawful adoption by the applicants pursuant to the Order for adoption read with Sections 9 and 25A of the Adoption Act 1952and Article 14(1)(b) Part II Second Schedule (a) of the Federal Constitution;

(b) that the child is a citizen of Malaysia by operation of law by virtue of his birth within the Federation of Malaysia pursuant to Article 14(1)(b) Part II Second Schedule (e) of the Federal Constitution;

(c) that the respondent did not have the jurisdiction to refuse to register the child as a citizen of Malaysia in his new birth certificate;

(d) that the respondent had acted in error of law and in excess of his jurisdiction by rendering the child stateless;

(e) that the respondent committed an error of law by taking into account that the child natural parents are not known, which is a totally irrelevant consideration;

(f) that the respondent has acted in disregard of the applicants' legitimate expectation that the respondent would issue a new birth certificate registering the child as a citizen of Malaysia; and

(g) that the respondent's decision is an error of law because the respondent had acted unreasonably (in the Wednesbury sense), that is, so unreasonably that no reasonable authority would have made such a decision to deprive the child of his Malaysian citizenship.

[108] It is unfortunate that the learned judge's full grounds for the decision are not available. However, from a perusal of the brief grounds above, it appears that the premise for the decision was twofold namely, that by virtue of the adoption order, and secondly, the birth of the child within the Federation, the child qualified as a citizen by operation of law.

[109] The respondent in replying to the arguments advanced by the applicant that s 1(e) Part II, Second Schedule of the Federal Constitution also applies to the applicant's case, initially submitted that the child here does not qualify as a citizen by operation of law as the intention of the framers of the Constitution in drafting art 14(1)(b) read together with s 1(e) of Part II, Second Schedule was to uphold the principle of 'jus soli'.

[110] She contended that the prerequisite to qualification to the right to citizenship by operation of law in art 14 was based on the jus soli of the father. In support, the respondent relied on the case of *Haja Mohideen bin MK Abdul Rahman & Ors v Menteri Dalam Negeri & Others* [2007] 8 MLJ 1, where the court held, inter alia, in an application under art 14(1)(b), Schedule 2, Part II of the Constitution, that the first 'qualification' is in fact the 'primary rule' conferring the right of citizenship by operation of law by the jus soli of the father. It is a rule conceived of a social contract by which the state recognised the natural law right of a citizen to have his offspring become a citizen after him.

[111] The term 'jus soli' however, refers to the rule that a child's citizenship is determined by place of birth. See *Black's Law Dictionary* (7th Ed), p 868. The *Oxford Dictionary of Law* (6th Ed), defines 'jus soli' as the rule by which birth in a state is sufficient to confer nationality, irrespective of the nationality of one's parents. From a perusal of the wordings in art 14 and s 1 Part II Second Schedule, I find that the concept of 'jus soli' could not have been the sole basis for the right to citizenship by operation of law pursuant to art 14 of the Constitution.

[112] In contradistinction to 'jus soli' is the concept of 'jus sanguinis' from the Latin 'right of blood', defined as the rule that the child's citizenship is determined by the parents' citizenship. See *Black's Law Dictionary* (7th Ed), p 868. According to the *Lexis Nexis Dictionary of Words, Phrases and Maxims*, 'jus sanguinis' is described as 'Right of blood; A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth'.

[113] After I requested parties to clarify whether the basis of citizenship by operation of law pursuant to art 14(1)(b) read together with s 1(e) of Part II, Second Schedule was based on the principle of jus soli or jus sanguinis, learned counsel for the respondent's submitted that citizenship under the said art 14(1)(b) read together with s 1(e) of Part II, Second Schedule was based upon a combination of the two principles.

[114] In support reference was made to the decision of the High Court of Namibia in *Tlhoro v Minister of Home Affairs* [2008] NAHC 65, and it was

submitted that the High Court of Namibia in considering the applicant's application for citizenship of Namibia by way of naturalisation had considered the reason behind the inclusion of the Namibian citizenship scheme in their Constitution which 'lies in the long and painful history of their nation's birth'.

[115] This is reflected from a passage in the judgement as follows:

> The tenor in which the Constitution in which the Constitution frames the citizenship scheme reflects an inverted relationship between the intimacy of a person's bond with Namibia and the power entrusted to Parliament to regulate the acquisition or loss of citizenship. But for a number of narrowly defined exceptions, art 4(1) of the Namibian Constitution recognizes the automatic acquisition of Namibian citizenship as of right by the mere incidence of birth in the country (jus soli) ...

[116] The case of *Singh v Commonwealth Of Australia* [2004] HCA 43 also cited by the respondent, indicate that the right of jus soli and jus sanguinis can be used in tandem in order to determine the right to citizenship and the two concepts were explained as follows:

> The common law rules in the late nineteenth century [81] By the late nineteenth century, international law recognised two well-established rules for acquiring nationality by birth: *jus soli and jus sanguini (the Australian Legal Dictionary (1997) defines jus soli to mean: a right acquired by virtue of the soil or place of birth. Under this right, the nationality of a person is determined by the place of birth rather than parentage.* Nationality is conferred by the state in which the birth takes place; and *defines jus sanguinis to mean: a right of blood. A right acquired by virtue of lineage. Under this right, the nationality of a person is determined by the nationality of their parents, irrespective of the place of birth)*. Jus soli, which emphasised place of birth, was favoured in the United Kingdom, the United States, Spain and many Latin American countries. Jus sanguinis, which emphasised the father's nationality, was favoured by most European states, such as France, Prussia and Austria-Hungary, particularly after the French Revolution, when France adopted the jus sanguinis rule in the Code Napol[e96f6e]. However, no nation relied exclusively on one of these principles to determine who was a natural born subject (see Royal Commission Report (1869) p viii, App 1). (Emphasis added.)

[117] In the case of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 36, cited by the respondent, it was observed:

> Although many countries of the world accept variations on a principle of nationality expressed in terms of jus soli (law of the place of birth), more have embraced the rule of jus sanguinis (law of descent). Singh accepts that the Federal Parliament may, within limits fixed ultimately by the courts, enact laws that adopt variations of both of these principles. International law recognises that nationality normally falls to be determined by the domestic law of each nation state. In the view of the majority, the

disqualifying element in Ms Singh's case was that, at birth, she was a citizen of a foreign state (India) and thus subject to the 'aliens' power in the Australian Constitution.

[118] Guided by the above authorities and from a reading together of both art 14(1)(b) and s 1(a) of Part II Second Schedule of the Malaysian Federal Constitution, it would therefore appear that the concept of citizenship by operation of law was premised on a combination of both the 'jus soli' and the 'jus sanguinis' principles.

[119] This determination further fortifies my earlier finding that the right to citizenship by operation of law pursuant to art 14(1)(b) read together with s 1(a) of Part II Second Schedule of the Constitution and the reference to the child's parents therein therefore must refer to the child's lawful or biological parents who are citizens of the Federation.

[120] Two latest decisions were also cited by learned senior federal counsel for the respondent's in further support. In the case of *Than Siew Beng & Anor v Ketua Pengarah Jabatan Pendaftaran Negara & 2 lagi* decided by Justice Asmabi Mohamed on 21 May 2015, the facts of the case are somewhat similar to the case under consideration.

[121] The first applicant deposed that he was the adopted father of the second applicant. The second applicant was allegedly a child born in Poliklinik & Surgeri Wanita Taman Dato' Ahmad Razali Ampang, Malaysia on 28 September 1998 and the first applicant and one Lim Lee Chiew were the parents.

[122] At the time of the birth of the second applicant, the first birth certificate issued stated that the first applicant and one Lim Lee Chiew had portrayed themselves as the biological parents of the second applicant and were married at the time of the birth of the second applicant.

[123] Both the first applicant and Lim Lee Chiew never revealed the fact to the first respondent that they were not the first applicant's biological parents and that they had taken the child in breach of the provided laws. The second applicant took the said child allegedly from a woman who gave birth in the said polyclinic.

[124] The first applicant had applied for the second applicant's identification card when the second applicant reached the age of 12 years by using the birth certificate first issued to them. However, the application was rejected as the first respondent's office suspected that the second applicant was not the biological child of the first applicant and Lim Lee Chiew.

[125] Only after investigation was conducted, the first applicant and Lim Lee Chiew revealed that the second applicant was not their child and that they had taken the first applicant away from his biological mother in 1998 and raised him as if he was theirs.

[126] Hence, the first birth certificate was revoked and a new birth certificate was issued in order to reflect the true information of the child. Due to the fact that no information was obtained on the biological parents, the new birth certificate contained no information in the parent's column.

[127] The first applicant and Lim Lee Chiew were asked to apply for an adoption order and had made an attempt to find the biological mother of the first applicant vide advertisement in the newspaper. The adoption order then was granted on 4 June 2012 by the first respondent under registration adoption No C0069571 dated 29 May 2012.

[128] The applicants then applied for citizenship by way of registration under art 15A of the Federal Constitution on 21 June 2012. The said application was rejected on 22 January 2014 and the said decision letter was issued by the Secretary-General of the Ministry of Home Affairs.

[129] The applicants then made an application to court for leave to file in judicial review. The court only allowed leave on the question of citizenship under art 14(1)(b) of the Constitution read together with s 1(e) Part II, Second Schedule of the Constitution.

[130] The High Court dismissed the applicant's prayers for citizenship based on art 14(1)(b) of the Constitution read together with s 1(e) Part II, Second Schedule of the Constitution at the leave stage as the applicants failed to show to the court that there was a prima facie arguable case.

[131] After hearing the application for judicial review and dismissing the applicant's application with costs, Justice Asmabi delivered oral grounds of judgment on art 14(1)(b) of the Constitution read together with s 1(e) Part II, Second Schedule of Constitution as follows:

(a) the High Court notes that the basic principle of assertion applies whereby he who asserts must prove. Thus, the applicants must prove first that the said child is a stateless person vide the application;

(b) the said child's birth certificate reveals that the said child was born in a private clinic and the said informant whom is the nurse in the said clinic informed and registered the said child's birth certificate;

(c) the High Court had perused through the application as a whole and had made a finding that there was no frank disclosure from the applicants to prove that the said child is stateless and that he has no citizenship;

(d) the applicants must show efforts have been made to locate the polyclinic and the nurse whom is the informant to the said child's birth. Nowhere in the affidavit of the applicants show that such efforts were made to obtain the medical report from the polyclinic or even to find the said nurse in order to show that the said child is truly stateless, and thus failed to satisfy the High Court to grant the relief sought for by the applicants;

(e) on the issue of adoption, s 9 of the Adoption Act 1952 does not at all mention any specific provision that allows the adopted child to be granted citizenship status. Without such express provision, the High Court has limited powers to stretch such boundaries to interpret to such effect;

(f) the case of *Foo Toon Aik* was referred and followed where the court made the observation and finding that the provisions were silent on citizenship by virtue of the adoption order and thus, it cannot be read into the law;

(g) the adoption order cannot be stretched to the Federal Constitution and it is the duty of the applicant's to prove whether the said child fulfills the requirement for citizenship of Malaysia;

(h) declaratory relief is discretionary and courts ought not to exercise the power as the facts are insufficient to show that the respondent was unreasonable, illegal, irrational or tainted with mala fide.

[132] In the case of *Lim Jen Hsian & Anor v Ketua Pengarah JPN & Ors*, the facts of the case are as follows and the issues dealt with were similar to the case of *Than Siew Beng* and the instant case.

[133] The first applicant deposed that he was the father of the second applicant. The second applicant was allegedly a child born in Hospital Tung Shin, Kuala Lumpur, Malaysia to a Thai citizen by the name of Rai-Putta Thipphawan ('Rai') and the first applicant on 6 October 2010 out of wedlock.

[134] Both the first applicant and Rai were never married or registered their marriage at the first respondent's office. The first applicant also deposed that both the first applicant and Rai separated in April 2011 and since then, Rai never came back from Thailand. The second applicant was said to be under the care of the second applicant's grandmother.

[135] The first applicant deposed that he does not have in his possession the second applicant's birth certificate. The second applicant then applied for the first time for the second applicant's citizenship on 9 April 2012 under art 15A

of the Federal Constitution and on 11 October 2013 the Secretary-General dismissed the second applicant's application under art 15A of the Constitution. The applicants received the said letter on 28 January 2014.

[136] The High Court dismissed the applicant's prayers for citizenship under art 14(1)(b) of the Constitution read together with s 1(e) Part II, Second Schedule of the Constitution at the leave stage as the applicant's failed to show to the court that there was a prima facie arguable case.

[137] Justice Asmabi delivered decision on 23 April 2015 by dismissing the applicant's application for judicial review with costs and the oral grounds of judgment (pharaprashed) given by Justice Asmabi were as follows:

[138] On the issue of being rendered stateless, the judge adopted the same reasoning as in the case of *Than Siew Beng* mentioned above.

[139] In this matter, the biological parents are clearly determinable and thus the child cannot be considered stateless. As there was no marriage between the said child's biological father and mother, thus the citizenship follows the mother in coherence to the provision in the Federal Constitution.

[140] The judge also made a similar finding on the issue of the effect of the adoption order that without express provision, the High Court has limited powers to stretch such boundaries to interpret to such effect. The case of *Foo Toon Aik* was referred and followed where the court made the observation and finding that where the provisions are silent as to whether the basis for citizenship is by the adoption order, it cannot be read into the law.

[141] It is the duty of the applicant's to prove whether the said child fulfills the requirement for citizen of Malaysia.

[142] Declaratory relief is discretionary and courts ought not to exercise the power as the facts are insufficient to show that the respondent was unreasonable, illegal, irrational or tainted with mala fide.

[143] The facts in the instant case bear the following similarities to the facts in the case of *Than Siew Beng*:

(a) the original birth certificate of the said child revealed the informant's name and the birth place of the said child. No efforts or attempts were shown in the applicant's affidavit in support in order to obtain the information or presence of the biological parents before seeking relief from this court and claiming the said child as stateless;

(b) the applicant had never attempted to apply for citizenship by way of registration under art 15A of the Constitution.

[144] I therefore find that in order for the grant of citizenship by operation of law pursuant to art 14(1)(b) of the Constitution read together with Part II of the Second Schedule s 1(a) the child must be born in the Federation to biological parents one of whom at least is at the time of birth either a citizen or permanently resident in the Federation.

Whether an adoption order operates to automatically confer the right to citizenship by operation of law?

[145] It is the submission of the applicant that the order of adoption automatically confers a right to citizenship upon the adopted child under art 14 of the Constitution. Firstly, it is to be noted that the Adoption Act 1952 contains no stipulation that an adoption order is to have any effect on the citizenship of a person. Although s 9 of the Adoption Act 1952 makes provisions for the effect that an adoption order has on matters such as parental rights, future custody maintenance, education including rights to appoint guardians, consent in relation to marriage and other rights, it has no express or implied reference to citizenship.

[146] In the case of *Foo Toon Aik (suing on his own behalf and as representative of Foo Shi Wen, Child) v Ketua Pendaftar Kelahiran dan Kematian, Malaysia*, it was held that without any express provision in the law to say that an adoption order has implication on the citizenship of the adopted child, such implication cannot be simply read into the law. Similarly, art 14 of the Constitution also contains no reference to the implications of an adoption and whether an adopted child can be treated as being born to a lawful parent for the purposes of art 14 of the Constitution. Similar observations were made in *Foo Toon Aik*'s case.

[147] In the recent decision of *Yu Sheng Meng v Ketua Pengarah Jabatan Pendaftaran Negara & Ors Kuala Lumpur High Court*, Asmabi Mohamed J in allowing the respondents' application to strike out the applicants' originating summons, held that an adoption order does not have an automatic effect on the application for citizenship by operation of law and the remedy of the child may lie elsewhere viz art 15A of the Federal Constitution.

[148] It can be observed that in jurisdictions that do confer right of citizenship by operation of law consequent upon the making of an adoption order, such provisions in the law were stated in express terms. An example is Australia where the Citizenship Act 2007 makes specific provision for the automatic acquisition of Australian citizenship by operation of law upon adoption if he

satisfies the conditions of adoption under s 13 of the said Citizenship Act 2007. The express wording in s 13 is as follows:

> 13 Citizenship by adoption
>
> A person is an Australian citizen if the person is:
>
> (a) adopted under a law in force in a State or Territory; and
>
> (b) adopted by a person who is an Australian citizen at the time of the adoption or by 2 persons jointly at least one of whom is an Australian citizen at that time; and
>
> (c) present in Australia as a permanent resident at that time.

[149] A similar position obtains in the United Kingdom where before its repeal in 2002, citizenship by adoption was provided for under sub-ss 1(5) and (5A) of the British Nationality Act 1981. These sections read as follows:

> *(5) Where –*
>
> (a) any court in the United Kingdom (or, on or after the appointed day, any court in the qualifying territory) makes an *order authorizing the adoption of a minor who is not a British citizen; or*
>
> (b) ...
>
> *that minor shall, if the requirements of sub* sections (5A) *are met, be a British citizen as from the date on which the order is made* or the Convention adoption is effected, as the case may be.
>
> (5A) Those requirements are that on the date on which the order is made or the Convention adoption is effected (as the case may be) –
>
> (a) the adopter or, in the case of a joint adoption, one of the adopters is a British citizen; and
>
> (b) in a case within subsection (5)(b), the adopter or, in the case of a joint adoption, both of the adopters are habitually resident in the United Kingdom. (Emphasis added.)

[150] It is therefore clear that in Australia and the United Kingdom (before the repeal), there are express provisions which stipulate that an adopted child was to be considered a citizen.

[151] In Singapore on the other hand, it was made explicitly clear that an adopted child would not automatically acquire citizenship. Article 121(1) of the Singapore Constitution provides that, 'every person born in Singapore after 16 September 1963, shall be a citizen of Singapore by birth', and at the time of his birth, either one of his parents is a Singapore citizen. Article 121 reads:

121 Citizenship by birth

(1) Subject to this Article, every person born in Singapore after 16th September 1963 shall be a citizen of Singapore by birth.

(2) A person shall not be a citizen of Singapore by virtue of clause (1) if at the time of his birth –

(a) his father, not being a citizen of Singapore, possessed such immunity from suit and legal process as is accorded to an envoy of a sovereign power accredited to the President;

(b) his father was an enemy alien and the birth occurred in a place then under the occupation of the enemy; or

(c) neither of his parents was a citizen of Singapore.

(3) Notwithstanding clause (2)(c), the Government may, where it considers it just and fair and having regard to all the circumstances prevailing at the time of the application, confer citizenship upon a person born in Singapore.

[152] For the purposes of Part X of the Singapore Constitution, the reference to a person's father or to his parent or to one of his parents in the case of an adopted child is a reference to his adopter. This is specifically provided for under sub-s 15(2) of the Third Schedule of the Singapore Constitution as follows:

15 Illegitimate children and adopted children

(1) ...

(2) In relation to an adopted child who has been adopted by an order of a court in accordance with the provisions of any law in force in Singapore, references to a person's father or to his parent or to one of his parents shall be construed as references to the adopter.

[153] However, is to be noted that the application of the Third Schedule is subject to any other law that the Legislature may pass. In this case, the Singapore Legislature had passed the Adoption of Children Act 1939 (Chapter 4) (Revised Edition 2012) ('the Adoption Act'). Subsection 7(9) of the Adoption Act provides that an adoption order shall not by itself affect the citizenship of the adopted child. This would mean that an adopted child who is not a citizen of Singapore at the time of the adoption would not automatically become a citizen upon the adoption.

7 Effect of adoption order

(1) Upon an adoption order being made –

(a) all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future

custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished;

(b) all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock; and

(c) in respect of the same matters and in respect of the liability of a child to maintain its parents, the adopted child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock,

except that in any case where 2 spouses are the adopters, such spouses shall, in respect of the matters in paragraphs (a) to (c) and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother respectively...

... *(9) An adoption order shall not by itself affect the citizenship of the adopted child.* (Emphasis added.)

[154] While the Singapore legislation made it abundantly clear that an adoption would not affect the citizenship of the adopted child, the position of legislation in Malaysia is silent on this aspect. It is trite that Parliament does not legislate in vain. It is equally clear that if our Legislature had intended to make provision for citizenship by operation of law upon the granting of an adoption order, such intent would have been expressly provided for. It is not the province of this court to read into the articles of the Constitution provisions that are not there.

Does the availability of an alternative remedy preclude this application from being made?

[155] The applicant here is not without remedy. Article 15A of the Constitution provides for citizenship by way of registration. It is not in dispute that the applicant has not resorted to this remedy which is open and available and remains open and available to her at all material times. In the case of *Lembaga Lebuhraya Malaysia v Cahaya Baru Development Bhd* [2009] 5 MLJ 14, held as follows:

Thus, generally speaking, *the court will not grant a declaratory judgement where an adequate alternative remedy is available* (*Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41) or upon an issue of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Reduffusion (Hong Kong) Ltd v A-G of Hong Kong & Anor* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn Bhd v Lye Thai*

Sang & Anor [1985] 2 MLJ 380) or other inequitable conduct (*City of London v Horner* (1914) 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (*Trawnik & Anor v Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v Griffiths* [1924] 1 KB 941 at p 960). We wish to make in plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion. (Emphasis added.)

[156] Chapter VIII of Part 2 of the Specific Relief Act, 1950 governs the performance of public duties. Section 44 of the Specific Relief Act 1950 provides as follows:

44 (1) A Judge may make an order requiring any specific act to be done ... by any person holding a public office:

Provided that –

(a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;

(b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) *the applicant has no other specific and adequate legal remedy; and*

(e) the remedy given by the order applied for will be complete.

(Emphasis added.)

[157] In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b, Sharma J held that the five conditions laid down in s 44 are cumulative and must be fulfilled. At p 181D, His Lordship held as follows:

Five conditions are laid down in section 44 and these conditions are the five provisos contained in the section which the applicant must satisfy. They are cumulative and all of them must be fulfilled.

[158] In the premises, I find that the applicant has failed to exhaust the alternative remedy open to her of applying for citizenship of the child by way of registration pursuant to art 15A of the Constitution. Not having exhausted this window of avenue, it is premature for the applicant to contend that the child is rendered 'stateless'. She has not therefore brought herself within the enabling provisions of s 44 of the Specific Relief Act 1950.

[159] For the reasons given above, I therefore find that the respondent had not acted in error of law and/or in excess of its jurisdiction. I also find that their decision was not unreasonable in the *Wednesbury* sense thereby rendering their decision liable to be quashed and I hereby dismiss this application with costs.

Application dismissed.

Reported by Ashok Kumar